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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1932.

No. 541

David Burnet, Commissioner of Internal Revenue,
Petitioner,

vs.

A. T. Jergins Trust,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals [R. 96-124], reported in 22 B. T. A. 551, was predicated largely upon its own decision in the case of *Coronado Oil & Gas Co. v. Commissioner* (14 B. T. A. 1214), subsequently reversed by the Supreme Court in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 76 L. Ed. 815. The opinion of the Circuit Court of Appeals [R. 183] in the case at bar has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 8, 1932. [R. 191.] The petition for writ of *certiorari* was filed December 8, 1932. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether, under the Federal Constitution and the Constitution of the state of California, the income derived by Taxpayer from the development and operation of land belonging to the city of Long Beach pursuant to a lease for a definite period is immune from Federal taxation?

2. Are expenditures for wages, fuel, repairs, hauling, *et cetera*, in connection with development and drilling of oil wells, capital expenditures subject to depreciation?

Question No. 2 becomes academic if Question No. 1 is answered in Taxpayer's favor.

Statutes and Constitutions Involved.

These are set forth in the appendix, *infra*, p. 25.

STATEMENT.

The Findings of Fact made by the United States Board of Tax appeals [R. 98-115] established, among others, the following facts:

For some years prior to 1911 the city of Long Beach had obtained its water supply from independent water companies which in turn obtained their water from sub-

terranean sources through artesian wells on land located approximately three miles north of the city of Long Beach. The water mains of these companies were made of such material that water escaped therefrom and caused mud holes in the streets. When it was necessary to shut the water off from the mains outside water would seep back into them and contaminate the water which thereafter came through them for the use of the city and its citizens. [R. 98.] The escaping water became stagnant and created unsanitary conditions. The mains could not resist sufficient pressure to enable the fire department to fight fires. To correct these conditions the city, in 1911, by public vote, authorized a bond issue for the purpose of acquiring these water lands and water systems. With the money thus obtained the city, in 1911, acquired about 600 acres of this land which has ever since been used by the city as a source of water supply. [R. 99.]

The Respondent (hereinafter referred to as the Taxpayer) was created in April, 1922, by virtue of a declaration of trust executed under and pursuant to the laws of the state of California, for the purpose of entering into an oil and gas lease with the city of Long Beach. On April 11, 1922, oil having been discovered in the vicinity of Long Beach, the city of Long Beach, as lessor, and Taxpayer, as lessee, entered into an oil and gas lease on approximately 140 acres of its water lands. The lease, among other things, provided [R. 100-108]:

(1) That Taxpayer would receive 60% of the proceeds derived from the oil and gas and the city would receive the balance or 40%;

(2) That Taxpayer was to pay all taxes on properties placed by it on the premises and 60% of all taxes levied by the State or Federal Government.

(3) That no structure should be erected within 150 feet of any reservoir;

(4) That no work should be done on west half farm lot 59 without the consent of the City Manager;

(5) That the lessee should operate so as to interfere as little as possible with reserved uses of lessor;

(6) That the lessee should protect all waterworks of lessor against any and all damage.

For the protection of its rights under the lease, the city during the years in question, maintained on the property a laboratory for the purpose of testing all the oil and gas produced; the city employed an oil engineer whose duty it was to see that Taxpayer performed and did not violate its contractual duties and to see that the city obtained the maximum amount to which it was entitled under the lease. [R. 109.] The oil and gas recovered from said premises have been sold under a joint contract of the city and Taxpayer as provided in the lease. Tests were made of the runs of oil. Conferences between Taxpayer's representatives and the city authorities have been generally held whenever the location of a new well was to be determined.

The city had made one other oil lease on another portion of its land. In addition to the foregoing, the city had issued temporary leases and permits which were subject to termination on short notice to about sixty tenants whose

business included airplane repair, hangars for aircraft, oil-well supplies, telephone, storage plants, cracking plants, oil-skimming plants, dehydration plants, gasoline absorption plants and farming. [R. 100.]

In 1922 all of Taxpayer's gross income was derived from oil and gas produced under the lease. In 1923 $985,790.34 was so derived, and in 1924 $1,935,376.82. [R. 109-110.] The Board of Tax Appeals held that the United States could tax that income, and sustained the Commissioner's determination to that extent. [R. 118.]

There was also submitted to the Board the question whether certain capitalized sums expended by the Taxpayer for drilling costs and development expense in connection with oil wells were returnable to Taxpayer through a depletion or a depreciation allowance. [R. 113-115.] The Commissioner had treated such sums as subject only to a depletion allowance, but the Board held that they were subject to depreciation allowance. [R. 120-123.]

The Taxpayer appealed from the portion of the Board's decision holding that its income derived from the oil lease on city lands was taxable, and the Commissioner appealed from the portion of the Board's decision allowing deduction of capitalized costs as depreciation. The Circuit Court of Appeals for the Ninth Circuit held that the tax proposed by the Commissioner could not constitutionally be imposed upon the income derived by the Taxpayer from the sale of oil taken from the land leased by the city, and concluded that the assessment of the Commissioner should be set aside. Accordingly, the Court did not pass upon the question presented by the Commissioner's appeal as that question then became academic.

Reasons for Not Granting Writ.

The taxpayer has not been served with a brief in support of the Commissioner's petition for writ of *certiorari* and it is assumed that no brief in support thereof will be filed or considered without affording taxpayer an opportunity to make a reply thereto.

The Decision of the Ninth Circuit in This Case Is but the Application of Principles Already Laid Down by the Supreme Court in Numerous Cases.

(A) The Supreme Court Has Repeatedly Held That if the Source From Which Revenue Is Derived Cannot Be Taxed Then the Revenue Itself Cannot Be Taxed.

In the famous case of *Pollock v. Farmers Loan and Trust Company*, 157 U. S. 429, on rehearing, 158 U. S. 601, at page 618, the Supreme Court said:

> "* * * As to the income from municipal bonds, they could not be taxed because of want of power to tax the source, * * *."

Further on at page 630 the Supreme Court made the following comment:

> "* * * and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; * * *."

The same principle is laid down as absolute in the following cases:

Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136;

Gillespie v. State of Oklahoma, 257 U. S. 501.

In the case of *Gillespie v. State of Oklahoma, supra,* the Court spoke as follows:

> "The rule as to instrumentalities of the United States, * * * is absolute in form * * *. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.
>
> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void."

The mandate of the Supreme Court expressed in the foregoing could not be more definite:

> "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases."

In the case of *Northwestern Mutual Life Insurance Company v. Wisconsin, supra,* the Supreme Court said:

> "Certainly, since Gillespie v. Oklahoma, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom."

The source of the revenue in this case was the land belonging to the city of Long Beach. Even disregarding for a moment the circumstances under which and purposes for which the land in question was acquired and used by the city, could the Federal Government lawfully and constitutionally impose a tax upon that land?

In the case of *Pollock v. Farmers Loan and Trust Company, supra,* we find the following language which is at once expressive of the reasoning and the decision of the Court in that case:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.
>
> "A municipal corporation is the representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. Collector v. Day, 11 Wall. 113, 124; United States v. Railroad Company, 17 Wall. 322, 332. In Collector v. Day, it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in Dobbins v. Commissioners, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: 'The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved", are as independent of the general government as that government within its sphere is independent of the States.'

"This is quoted in Van Brocklin v. Tenn., 117 U. S. 151, 178, and the opinion continues: 'Applying the same principles, this court, in United States v. Railroad Company, 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. *The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held.* The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation.' "

It is not necessary to dwell upon the Baltimore case, *supra*, where a similar question was involved, for the reason that this Court has already placed its construction upon that case in the language we have italicized above.

There have been several attempts on the part of the states to tax lands belonging to the United States. (*Van Brocklin v. Tenn.*, 117 U. S. 151; *Wisconsin Central Railroad Company v. Price County*, 133 U. S. 496; *Lee*

v. Osceola Improvement District, 268 U. S. 643.) Each and all of these efforts have failed.

The courts have uniformly held that the states and their political subdivisions have no power or authority to impose a tax upon lands held in the name of the United States, and this is true even though such lands are held by the United States in its proprietary rather than its sovereign capacity. (*Woodruff v. North Bloomfield Gravel Co.,* 18 Fed. 754.) While there have been numerous attempts on the part of the states and their political subdivisions to tax the lands of the Federal Government, there has not been so far as our search reveals even an attempt on the part of the Federal Government to tax any lands belonging to a state or one of its political subdivisions. The very reasons that forbid the one forbid the other. They are alike repugnant to the established conception of the dual sovereignty of the several states and of the United States. Chief Justice Taft summarized the rule in *Irwin v. Wright,* 258 U. S. 219, where he said at page 228:

> "The rule established by the decisions of this court is that, by virtue of the sovereignty and constitutional power of Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, no state can tax the property of the United States within its limits."

Does not a state have the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the" state or of one of its political subdivisions operating through a charter granted by the state? Such power is inherent to sovereignty.

Such power was never relinquished by the states to the Federal Government. The Federal Government recognized this when in its Act of August 5, 1861, levying a direct tax apportioned in conformity with the Constitution it provided in section 13 of the Act as follows:

> "Provided however that all property of whatever kind, coming within any of the foregoing description, and belonging to the United States or any state, either permanently or specially exempted from taxation by the laws of the state wherein same may be situated at the time of the passage of this Act * * * shall be exempted from the aforesaid enumeration and valuation and from the direct tax aforesaid."

Section 1 of article XIII of the Constitution of the state of California provides that property belonging to the "United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation". Section 12 of article XIX of the Constitution of the state of California provides as follows:

> "The Legislature shall have no power to impose taxes upon counties, states, or other public or municipal corporations, or upon the inhabitants or property thereof for county, city, town or other municipal purposes. * * *."

There have been a large number of acts levying direct taxes upon land in the United States enacted by Congress during the history of our country, and so far as we are aware no attempt has ever been made to levy a tax upon land belonging to a municipality. The acts have always recognized the constitutional limitation by expressly exempting such property from the provisions of the acts.

(B) THE DECISION OF THE COURT BELOW DOES NOT INVOLVE AN EXTENSION OF THE IMMUNITY OF STATE INSTRUMENTALITIES FROM FEDERAL TAXATION.

The Commissioner, in his petition, states:

> "The decision of the court below involves a radical extension of the immunity of State instrumentalities from Federal taxation. Such immunity is extended in this case to the lessee of oil lands owned by a municipality which were not devoted to a governmental purpose, without proof that the royalties payable to the city under the provisions of the lease were to be devoted to any governmental purpose."

This statement, it is respectfully submitted, fails to recognize the significance of the Findings of Fact of the Board of Tax Appeals which show distinctly that the city's purpose in acquiring the land was to clean up the unsanitary conditions then existing in its water supply, to improve the streets and to provide adequate pressure for fighting fires. It was the lack of sanitary conditions, the lack of adequate pressure for fire fighting purposes and the lack of wholesome water for its inhabitants that prompted the city to issue bonds for the purpose of acquiring the water lands. The record discloses that the lands have ever since been used for the purposes for which they were acquired. In addition thereto, the land has been devoted to other uses which did not interfere with the city's water systems.

The city of Long Beach was created for the purpose of protecting the life, liberty and property of its citizens and promoting their general welfare. The protection of life includes necessarily the protection of health which

can be attained only by eliminating unsanitary conditions and the maintenance of clean environment and safe highways for travel. It also includes protection of life and property by guarding against destructive fires which can only be accomplished by having proper fire fighting apparatus supported by an adequate and reliable water supply.

This Honorable Court has held that:

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."
>
> *City of Columbus v. Mercantile Trust & Deposit Company of Baltimore,* 218 U. S. 645, 54 L. ed. 1193.

It is the established law in the state of California that the activity of the city in the protection against or extinguishment of fires and the maintenance of public streets and roads are governmental functions.

Denning v. State, 123 Cal. 316;
Davoust v. City of Alameda, 149 Cal. 69.

See also:

Chicago, B. & Q. Railroad Co. v. Illinois ex rel. Grimwood, 200 U. S. 561, 50 L. ed. 596.

The record conclusively establishes the fact that the city of Long Beach acquired and held its lands for at least three governmental purposes, to-wit: protection against

fire, protection of health and maintenance of streets. The Commissioner, in his brief before the Circuit Court of Appeals (page 27), specifically admitted that fire protection is a governmental function. The "furnishing of an ample supply of pure and wholesome water for public and domestic purposes" is also a governmental function, but even conceding that the furnishing of pure and wholesome water was in the nature of a so-called proprietary function, nevertheless, that would not be sufficient reason to deny to Taxpayer the application of the principles herein contended for.

The argument now advanced by the Commissioner was advanced by the state of Maryland in the famous case of *McCulloch v. Maryland*, 4 Wheat. 316. Mr. Hopkinson, representing the state of Maryland, argued that it was no essential governmental function for the United States to charter and regulate a national bank, and particularly was it outside the constitutional powers of the Federal Government to do so since the branch of the national bank was actually engaged in business and competing with local banks. Mr. Webster, who represented the Federal Government, stated in his brief, page 330:

> " * * * A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government that Congress should be able to exercise its constitutional powers at its own discretion, without being subject to the control of state legislation. The question is not whether a bank be necessary, or useful, but whether Congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its

decision into effect, the state governments may interfere with that decision, and defeat the operation of its measures. * * *."

The argument of Mr. Webster was adopted by Chief Justice Marshall wherein he stated at pages 409 and 410:

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

At page 411:

"* * * No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. * * *."

At pages 415 and 416:

"* * * To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this

> principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. * * *."

At page 421:

> "* * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In view of the foregoing, it is respectfully submitted, that the record disproves the statement in the Commissioner's brief, to-wit: that the "lands were not devoted to a governmental purpose". The Commissioner should, as he did before the Appellate Court, recognize at least the element of the exercise of a governmental function in the acquisition of the lands. It is believed that the record conclusively demonstrates that the lands were acquired and were used for governmental purposes, but even assuming that there was an element of a proprietary function still that would not be sufficient reason for overruling the lower court's opinion. The question the Commissioner desires this Court to pass on was presented to this Honorable Court more than one hundred years ago. The branch bank of the United States (referred to in the case of *McCulloch v. State of Maryland*, 4 Wheat. 316) operating at Baltimore was not only a Federal depositary created under the National Banking Act, but was also engaged in a general banking business in competition with local banks. In commenting on the famous case of *McCulloch v. State of Maryland*, this Honorable Court in

Osborn v. United States, 9 Wheaton 738, 6 L. ed. 204, stated at page 860:

> "* * * The whole opinion of the court, in the case of McCulloch v. The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States,' It is not an instrument which the government found ready-made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business."

And at page 867:

> "* * * If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them."

The Federal Government had only the implied right to create a bank while in the case at bar the city of Long Beach had specific authority in its charter and in the Constitution of the state to own and use the land. The state Constitution forbids the taxing of the land. If the contention now made by the Commissioner were sound, we would not have had the decision in the famous McCulloch case. This Honorable Court has repeatedly held that the purchase by a city of securities of a private corporation was an exercise of a governmental function. (*United States v. Baltimore & Ohio Railroad Company*, 84 U. S. 322, 21 L. ed. 597.)

The city's ownership of bonds is no more sacred and no more a sovereign right than its ownership of land, even though that land be revenue-producing. A municipal bond is property of the city; likewise, the land in this case is property of the city. Neither logic nor common sense could make a distinction between them insofar as the sovereign right is concerned; "* * * as to the income from municipal bonds, that could not be taxed because of want of power to tax the source;" *as to the income from the city's land, that could not be taxed because of want of power to tax the source.*

> "* * * And it follows, that if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue *from any other source not subject to tax.*" (Italics ours.)

It is seen that the principles raised by the Commissioner in his petition for writ of *certiorari* have been settled by this Honorable Court in many, many decisions over a period of the past one hundred years.

It is recognized by historians and biographers that the opinion of the immortal Marshall in the McCulloch case vitalized the Constitution. The necessity for the perpetuation of the principal in this case is just as urgent today (and perhaps more so) as it was in Marshall's time. The Commissioner would have this Court again pass upon this question so long established and would have this Court interpret the Constitution with the strictness of a code of law. The "liberal application of the foregoing principles * * * is essential to the preservation of the constitutional limitation." (*The Macallen Co. v. Massachusetts*, 279 U. S. 620.) The Constitution is not to be interpreted with the strictness of a code of law or a private contract. The provisions for the protection of life, liberty and property are to be largely and liberally construed.

The decision of the lower court does not, it is most respectfully submitted, extend the immunity doctrine; it merely recognizes the interpretations placed upon the Constitution by this Honorable Court for over a period of one hundred years and which interpretations have become as much a part of the Constitution as the written words therein. The decision of the lower court is well within the periphery of established principles that one sovereign may not tax the income derived by a lessee of the other. Instead of being an extension of the doctrine, the record brings the decision right to the core of the immunity doctrine. This is emphasized by the following excerpt from the Court's opinion:

> "As we understand it, it is not contended by the Commissioner that the forty per cent royalty paid to the city is taxable as income derived by it from its lands held in a proprietary capacity, nor, indeed,

> do we see how such a claim could be made in view of the early decision of the Supreme Court of the United States in *U. S. v. Baltimore & Ohio Ry. Co.*, 17 Wall. 322, wherein the Supreme Court held that the revenue derived by a state from bonds of the B. & O. Ry. Co., owned by it, were not taxable by the federal government, although the bonds were issued to the city to secure the repayment to the city of $5,000.00 loaned by the city to the B. & O. Ry. Co., to enable it to extend its facilities for transportation with a view of aiding the city in securing a portion of the commerce flowing from the West to the East. *The general purpose of the city of Baltimore in purchasing the bonds of the Baltimore & Ohio Railway Company was much less closely related to the governmental functions of the city than the acquisition by the city of Long Beach of water-bearing lands and a water distributing system for the inhabitants thereof, and for their fire protection.*" (Italics ours.)

It is thoroughly settled that income derived from municipal bonds is exempt from taxation because such a tax is in effect a tax on the power of the states and their instrumentalities to borrow money. This, of course, is true regardless of the purpose for which the bonds were issued and without reference to the question of whether or not the bonds were issued by the city or state for the purpose of acquiring property to be held by it in its proprietary capacity.

If, in the determination of the taxability of income from a municipal bond, it should be held that an inquiry could be made into what the proceeds of the bonds were used for, then, of course, endless litigation would arise and the immunity doctrine so vital to our Constitution would

be defeated; it would devitalize the Constitution. To lay a tax upon the A. T. Jergins Trust as an instrumentality of the city of Long Beach, or to inquire into the use of the funds by the city of Long Beach is "derogatory to the latter's dignity, subversive of its powers and repugnant to its paramount authority."

The decision of the lower court, it is respectfully submitted, will not impair the revenues of the Government. It is doubtful if another case similar to the case at bar will ever arise. The reasons for the application of the immunity doctrine to the case at bar are stronger and more compelling than the reasons supporting the case of *United States v. Baltimore & Ohio Railroad Company*, 84 U. S. 597, which was decided by this Honorable Court on April 7, 1873. The Board of Tax Appeals' decision in the case at bar was based upon its decision in the case of *Coronado Oil & Gas Company v. Commissioner of Internal Revenue*, 14 B. T. A. 1214 (50 Fed. (2d) 998), which was reversed by the Court of Appeals for the District of Columbia, the latter decision having been affirmed by this Honorable Court on April 11, 1932.

As heretofore stated, Question No. 2 relating to the deduction for depreciation of the amounts expended for drilling, *et cetera*, was not considered by the lower court because Taxpayer's entire income was held to be exempt from taxation. This question is likewise academic in this proceeding.

In conclusion, it is respectfully submitted:

1. That the decision of the lower court is supported by the established principles of law affirmed and reaffirmed during the past century by this Honorable Court.

2. That the decision is not an extension of the immunity doctrine repeatedly enunciated by this Honorable Court.

3. That the record in the case at bar shows very clearly that instead of the decision being an extension it is well within the periphery of established principles that one sovereign may not tax the income derived by the lessee of the other; instead of being an extension of the doctrine, it is respectfully submitted that the record in this case brings the decision right to the core of the immunity doctrine.

4. The decision of the lower court was in effect affirmed by this Honorable Court in its decision in the case of *David Burnet, Commissioner of Internal Revenue v. Coronado Oil & Gas Company*, 285 U. S. 393.

5. The decision of the lower court is not likely to impair the revenues of the Government.

In view of the foregoing, Taxpayer respectfully prays that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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APPENDIX.

United States Constitution—Implied Provisions.

Constitution of the state of California:

"Article XIII, Sec. 1. Taxation to be in proportion to value. All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * *; and further provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, * * *."

Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 254:

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

Section 213 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 283 (U. S. C., Title 26, Secs. 954 and 985) contain provisions substantially the same as those of the corresponding section of the 1921 Act above quoted.